

EFFICACY OF LENIENCY PROGRAMME IN CARTELISATION CASES



For a well-established, well-functioning, and successful economy the competition is said to be prerequisite which ensures all round growth, advances human civilization by making us goal oriented. Additionally, competition

reduces the burden of State's

regulatory machineries by providing a transparent, consistent, and favourable business environment and restricting anti-competitive agreements and activities. But, all the time such situation does not occur. Business institutions or persons involved in business, for more and more benefits, enter into agreements not to compete on price, products or customers with the objectives of raising price above competitive levels which, in turn, results in violation of customers' right to choice, providing poor quality of goods/ services to customers ultimately

injuring the respective economy. Such agreements or activities are called cartelisation, prohibited under section 3 of the Competition Act, and, being in violation of laws, committed in complete secrecy, the detection of which is not an easy task for the State. In justice delivery system, the detection of any wrong including cartelisation cases is thought to be of prime importance to detect and punish the wrongdoers. The leniency programme, inter alia, is a key tool to detect and crack the cartelisation. The present paper discusses the efficacy of leniency programme in



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cartelisation cases.

Understanding Leniency Programme:

The term 'leniency', as per Oxford Dictionary of English at page 1011, means 'the fact or quality of

delivering the justice. The reduction in penalty may be full (which is known as complete immunity) or partial as per the stage of providing information and nature of cooperation extended by the person applying for leniency. Taking the note of nature, effects and seriousness of wrongs committed in secrecy, the leniency programmes have been accepted as effective device to detect, investigate, and combat wrongs worldwide.

The leniency programme, introduced in cartelisation cases, is like a whistleblower protection wherein a cartel member comes forward and discloses the information relating to cartel to the Competition Commission of India (CCI) and accordingly the lenient treatment is offered to him/her.

The leniency programme is very much advantageous to the justice delivery system by compelling a participant of cartel to disclose the information which otherwise might not be available. Thus, it is said that this programme has accorded effective system of collection of evidence, lowering

being more merciful or tolerant than expected'. In legal sense, this term is used in respect of reducing the penalty of a person who is involved in any wrong in lieu of his full cooperation in deciding the matter with true and full disclosure of the information required in

the adjudication expenses etc. A UNCTAD document mentions that 'leniency programmes are designed to give incentives to cartel members to come in, confess and aid the competition law enforcers. They aim to drive a wedge through the trust and mutual benefit at

the heart of a cartel. They reward one, or a very few, whistleblowers with a large reduction in penalties (as compared to that calculated absent leniency), but not the other cartel members. In other words, they increase the attractiveness of whistle-blowing, especially of being the first whistle-blower, as compared with continuing the cartel.'

Leniency Programme in Indian Cartelisation Cases:

The legal basis of leniency programme in India is contained in section 46 of the Competition Act, 2000 read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 which enumerate the essential conditions for availing leniency programme, details of filing application, procedure for grant, maintenance of confidentiality etc. Section 46 encourages the producer, seller, distributor, trader or service provider, who are involved in any cartel, to come forward and disclose correctly, fully and truly the alleged violations to the CCI and in lieu of their 'vital disclosure' there will be lenient treatment with the respective person/institution in form of a lesser penalty than leviable under the Act or the rules or the regulations as the CCI thinks fit. The term 'vital disclosure' means full and true disclosure of information or evidence by the applicant to the CCI, which is sufficient to enable the CCI to form a prima-facie opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 of the Act.

There may be full or partial leniency in form of penalty reduction ranging from 100%, with a staggered reduction up to 75%, 50% and so forth depending on-

- i. the stage at which the applicant comes forward with the disclosure;
- ii. the evidence already in possession of the CCI;
- iii. the quality of the information provided by the applicant; and
- iv. the entire facts and circumstances of the case.

The full leniency (100% penalty reduction) may be granted only to the first applicant who has made the full, true, and vital disclosures to the CCI. The subsequent applicants i.e. second and third applicants also may be offered only partial leniency in penalty of 50% and 30% respectively by submitting evidence, which in the opinion of the CCI, may provide significant 'added value' to the evidence already in possession of the CCI. The term 'added value' means the extent to which the evidence provided enhances the ability of the CCI or the Director General, as the case may be, to establish the existence of a cartel, which is alleged to have violated section 3 of the Act.

Conditions for Lesser Penalty

The conditions for availing benefits of leniency programme are contained in Regulation 3 of the Regulations, 2009 which provides that the applicant must-

- ★ cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the CCI
- ★ provide vital disclosure in respect of violation under section 3 of the Act
- ★ provide all relevant information, documents and evidence as may be required by the CCI
- ★ co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other

While leniency programmes are the most effective cartel discovery tool today, they are only effective when paired with active search for and significant punishment of cartelists.

-UNCTAD

proceedings before the CCI

- ★ not conceal, destroy, manipulate or remove the relevant documents in any manner, that may contribute to the establishment of a cartel.

If any applicant does not comply with the conditions mentioned above, the CCI is free to use the information and evidence submitted by the applicant. Further, it is relevant to mention here that the applicant must provide the information before the receipt of investigation report.

Procedure for Grant of Lesser Penalty

The applicant or its authorized representative may, seeking benefit of lesser penalty, apply to the designated authority orally or in writing or through fax or email mentioning the following details-

- ★ name and address of the applicant or its authorized representative as well as of all other enterprises in the cartel
- ★ if the applicant is based outside India, the address of the applicant in India for communication including the telephone numbers and the email address, etc.
- ★ a detailed description of the alleged cartel arrangement, including its aims and objectives and the details of activities and functions carried out for securing such

aims and objectives

- ★ the goods or services involved
- ★ the geographic market covered
- ★ the commencement and period of the cartel
- ★ the estimated volume of business affected by the alleged cartel
- ★ the names, positions, office locations and, wherever necessary, home addresses of all individuals who, in the knowledge of the applicant, are or have been associated with the alleged cartel, including those individuals which have been involved on behalf of the applicant
- ★ the details of other Competition Authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel
- ★ a descriptive list of evidence regarding the nature and content of evidence provided in support of the application for lesser penalty
- ★ any other material information as may be directed by the CCI.

Thereafter, the designated authority has to put up the matter, within 3 working days, before the CCI for its consideration and thereupon the CCI assigns the priority status to the applicants in the order of their initial contact with it. 'Priority status' means the position of the applicant marked for giving the benefit of lesser penalty in the queue of the applicants. Accordingly, the applicant is being informed by the designated authority. Where the information is received by the CCI orally or through e-mail or fax, the applicant is required to submit a written application containing all

the material information as specified above within a period not exceeding fifteen days or such further period as extended by the CCI. The failure of applicant to do so will result in losing the applicant's status moving up other applicants, if any, in queue. If the applicant does not properly cooperate the CCI, his application may be rejected by the CCI after providing due opportunity to be heard. The information relating to granting or rejecting the application is communicated by the CCI to the applicant.

Revocation of Lesser Penalty

The lesser penalty granted to a cartel is conditional and it may be revoked whenever the CCI is satisfied that any cartel to whom lesser penalty was granted had in the course of proceedings-

- ★ not complied with the condition on which the lesser penalty was imposed by the CCI; or
- ★ had given false evidence; or
- ★ the disclosure made is not vital and thereupon such cartel may be tried for the wrong with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person have been liable, had

lesser penalty not been imposed.

Maintaining Confidentiality-

Section 57 of the Competition Act mandates that information relating to any enterprise, which has been obtained by or on behalf of the CCI or the Appellate Tribunal for the purposes of this Act, shall not be disclosed without the previous permission in writing of the enterprise.

Further, Regulation 6 provides that the identity of the applicant or the information obtained from it is confidential and the CCI is under obligation to not disclose the identity or the information obtained unless-

- ★ the disclosure is required by law or
- ★ the applicant has agreed to such disclosure in writing or
- ★ there has been a public disclosure by the applicant

Recently, the constitutional validity of Regulation 6, inter alia, was challenged before Hon'ble Delhi High Court in Premier Rubber Mills v. Union of India & others claiming that the provisions of confidentiality under Regulation 6, inter alia, cannot override the mandate under section 57 as section 57 allows to disclose the confidentiality only in

case of written permission of the enterprise but Regulation 6 provides additional grounds of disclosure. Hon'ble High Court, dismissing the petition, held that the challenged regulation is constitutionally valid.

Appeal

The order of the CCI regarding lesser penalty may be challenged in the Competition Appellate Tribunal which has been established under section 53A to hear and dispose of appeals against any direction issued or decision made or order passed by the CCI.

Implementing Leniency Programme in India: Current Scenario

The legal journey of leniency programme in India commenced with implementation of section 46 on 22 May, 2009 and issuance of the Competition Commission of India (Lesser Penalty) Regulations, 2009 on 13th August, 2009. But, the CCI could not receive any leniency application till 2013 (The Economic Times). The details regarding implementation of leniency programme in India (2009-10 to 2015-16) are contained in Table-I. It is evident from Table-I that this programme could not attract the cartels.

Table-I: Imposition of Lesser Penalties under Section 46

Description	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Number of matters in which lesser penalty imposed	0	0	0	0	0	0	0
Number of persons or enterprises on whom lesser penalty imposed	0	0	0	0	0	0	0
Number of persons granted full leniency and partial leniency in each matter	0	0	0	0	0	0	0

Source: Annual Reports, CCI, 2009-16

But, the CCI in its first ever case on 18 January, 2017 has implemented the leniency provisions in the case of In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items wherein three firms i.e., M/s Pyramid Electronics, Parwanoo, M/s R Kanwar Electricals, Noida and M/s Western Electric and Trading Company, Delhi were found involved in cartelisation regarding the tenders floated by the Indian Railways and the Bharat Earth Movers Limited for the supply of Brushless DC fans and other electrical items by the Central Bureau of Investigation, New Delhi. After completion of investigation of the matter by the Director General, M/s Pyramid Electronics, Parwanoo firstly applied under leniency programme for lesser penalty. The CCI, being cognizant of the stage at which the applicant approached the CCI not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the CCI at that stage, granted 75% reduction in the penalty.

Proposed Draft on Lesser Penalty:

With the objective of encouraging more cartelists to report cartelisation and making legal machinery more effective and working, the CCI has proposed amendments in Regulations, 2009 by issuing 'Draft of Proposed Amendments to the Competition Commission of India (Lesser Penalty) Regulations, 2009'. It, inter alia, mentions that the applicant, seeking lesser penalty, has to provide the names of individuals, if any, who have been involved in the alleged cartel on its behalf and for whom lesser penalty is sought. Next, it has added that where the evidence furnished by the

applicant to the CCI is not sufficient to enable the CCI to form a prima facie opinion about the existence of a cartel, the CCI through its designated authority shall inform its decision to the applicant.

Concluding Observations:

In every society, it is expected from everyone to follow the legal norms prevailing in the respective society and the wrongdoers, for not complying with legal norms, should be punished by the courts following the due procedure of law. But, such situation does not arise always. In some cases, where the detection of wrong is not easy, the State adopts other methods also like offering lenient treatment to a wrongdoer in exchange of providing complete, correct and vital information to the State authorities. Though, such leniency is not ethically justified as such benefit is going to be given to a person who himself is a wrongdoer but State has no other tools also to detect and punish the wrongdoers. For an effective leniency programme, the State must have skilled and efficient machineries of detection and punishment for cartelists. In this respect, a UNCTAD document mentions that 'a leniency programme is ineffective unless cartels are actively and significantly punished. If that precondition is not met, then it is rational to forego a leniency programme.' **MA**

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